Supreme Court, U.S.
FILED
MAY 29 1992
OFFICE OF THE CLERK

No. 91-1641

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1991

FEDERAL BUREAU OF INVESTIGATION, et al.,
*Petitioners,*
*vs.*
JONATHAN M. WIENER,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK D. ROSENBAUM
*Counsel of Record*
ROBERT MALLEY
PAUL L. HOFFMAN
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, CA 90026
(213) 977-9500

DAN MARMALEFSKY
HUFSTEDLER, MILLER,
KAUS & BEARDSLEY
355 South Grand Avenue
45th Floor
Los Angeles, CA 90071
(213) 617-7070

STEVEN SHAPIRO
ACLU FOUNDATION
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

*Attorneys for Respondent*

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

## QUESTION PRESENTED

Should this Court grant review in a case where the court of appeals simply held that the FBI's vague, boilerplate justifications for refusing to disclose materials subject to a FOIA request failed to supply information sufficient to enable the court to reach a decision on the merits of the exemption claims, and remanded to require the government to provide more adequate explanations?

## TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES . . . . . ii

QUESTION PRESENTED

STATEMENT OF THE CASE . . . . . 1

REASONS FOR DENYING THE WRIT . . . . . 5

I. The Decision Below Followed Settled Principles . . . . . 6

II. Review By This Court Would Be Premature . . . . . 18

CONCLUSION . . . . . 23

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Brown v. Federal Bureau of Investigation*,
658 F.2d 71 (2nd Cir. 1981) . . . . . 10

*Church of Scientology of California v. I.R.S.*,
792 F.2d 146 (D.D.C. 1986) . . . . . 16, 17

*Cox v. United States Dep't of Justice*,
576 F.2d 1302 (8th Cir. 1978) . . . . . 16

*Cuneo v. Schlesinger*,
484 F.2d 1086 (D.C.Cir. 1986) . . . . . 17

*Department of Justice v. Reporters Committee*,
489 U.S. 749 (1989) . . . . . 21

*Donovan v. F.B.I.*,
806 F.2d 55 (2nd Cir. 1986) . . . . . 16

*EPA v. Mink*,
410 US 73 (1973) . . . . . 7, 8

*Ferri v. Bell*,
645 F.2d 1213 (3rd Cir. 1981) . . . . . 8

*Ingle v. Department of Justice*,
698 F.2d 259 (6th Cir. 1983) . . . . . 14, 15, 16

*John Doe Agency v. John Doe Corp.*,
493 U.S. 146 (1989) . . . . . 7

*King v. United States Department of Justice*,
830 F.2d 210 (D.C. Cir. 1987) ..... 9, 15

*Lam Lek Chong v. United States Drug Enforcement Admin.*,
929 F.2d 729 (D.C. Cir. 1991) ..... 18

*Lame v. United States Dep't of Justice*,
654 F.2d 917 (3rd Cir. 1981) ..... 17

*Landano v. U.S. Dep't of Justice*,
956 F.2d 422 (3rd Cir. 1992) ..... 17

*Lewis v. I.R.S.*,
823 F.2d 375 (9th Cir. 1987) ..... 10

*Lykins v. Department of Justice*,
725 F.2d 1455 (1984) ..... 15

*NLRB v. Robbins Tire & Rubber Co.*,
437 U.S. 214 (1978) ..... 15

*Phillippi v. Central Intelligence Agency*,
546 F.2d 1009 (D.C.Cir. 1976) ..... 8, 15

*Powell v. United States Department of Justice*,
584 F. Supp. 1508 (N.D. Cal. 1984) ..... 9

*Seafarers International Union of AFL-CIO v. Baldovin*,
508 F.2d 125 (5th Cir. 1979) ..... 13

*Silets v. United States Dep't of Justice*,
945 F.2d 227 (7th Cir. 1991) ..... 17

*Vaughn v. Rosen*,
484 F.2d 820 (D.C. Cir. 1973),
*cert. denied*, 415 U.S. 977 (1974) . . . . . *passim*

*Vaughn v. United States*,
936 F.2d 862 (6th Cir. 1991) . . . . . 10, 18

**Statutes**

5 U.S.C. 552 (1988) . . . . . *passim*

5 U.S.C. 552(a)(4)(B) . . . . . 7, 8

**Miscellaneous**

S.Rep. No. 93-854, 93d Cong., 2d Sess. (1974) . . . . . 8

*Final Report*, Book 2, 94th Cong., 2nd Sess. (1976) . 3

Respondent Jonathan M. Wiener respectfully asks the Court to deny the petition for a writ of certiorari for the reasons stated below.

## STATEMENT OF THE CASE

Jonathan M. Wiener, a Professor of History at the University of California, Irvine, brought this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552 (1988), against four offices of the Federal Bureau of Investigation, seeking disclosure of FBI records concerning John Lennon, a former member of the Beatles.

As revealed by the documents the Bureau did disclose (in whole or in part), the FBI closely monitored Lennon's activities in the early 1970s at the direction of the White House and high FBI officials, as part of what Wiener argued was a pattern of abuse of executive agency power to suppress political dissent. Although Lennon was never arrested, indicted or prosecuted for any act during the period of FBI surveillance, or at any time thereafter, the FBI classified his file for years. The documents disclosed after Wiener's request, or after the filing of this action, reveal no apparent legitimate explanation for their prior secrecy.[1]

---

[1]For example, the FBI had classified as "confidential" for ten years all of document DE-4, relying upon the FOIA exemption from disclosure of "information which is currently and properly classified . . . in the interest of national defense or foreign policy." In January 1983, after submission of Wiener's request, certain sections of the document were declassified and released, among them, the complete lyrics from one of Lennon's songs, as precisely transcribed by an

(continued...)

Instead, they expose a politically-motivated attempt to neutralize Lennon's perceived effectiveness in organizing anti-war opposition against the president during the 1972 campaign in particular.[2] As the documents suggest, and as Professor Wiener wished to demonstrate, Lennon appears also to have been a victim of a vast spying operation organized by the Central Intelligence Agency (CIA) between 1967 and 1974,

---

[1](...continued)
agent and as performed at a December 1971 anti-war rock concert in Ann Arbor, Michigan. Also included among the declassified documents was DE-3, a newspaper review of a Lennon rock concert, reporting in part that the performance of a new song was "lacking Lennon's usual standards and that Yoko Ono, who also appeared, 'can't even remain on key.'"

[2]For instance, document HQ-38 relates a report from the San Francisco FBI office to then Acting Director L. Patrick Gray that, as of August 1, 1972, Lennon would make public his support for Senator George McGovern in the presidential election. FBI director J. Edgar Hoover stated in a memorandum dated April 10, 1972, that "[s]ubject [Lennon] continues to plan activities directed toward RNC [Republican National Convention] and will soon initiate a series of 'rock concerts' to develop financial support." HQ-8. Documents including HQ-11, HQ-12, HQ-15 and HQ-37 discuss the reported appointment of Lennon to a teaching position at New York University during the summer of 1972. Though the information was false, the memoranda were classified "confidential" and "urgent." Similarly, Acting FBI Director Gray stated in a 1972 FBI memorandum (HQ-20) to the special FBI agent-in-charge in New York, also partially withheld pursuant to the (b)(1) national defense exemption, that "FBI agents testifying [regarding surveillance of Lennon], would not be in the Bureau's best interest and could result in considerable adverse publicity."

results of which were conveyed to high-level FBI officials. Thus, a document relating information concerning John Lennon transmitted to the FBI by the CIA contains the heading "MHCHAOS." This heading refers to Operation CHAOS which, according to the 1976 Report of the Senate Intelligence Committee (the Church Committee), involved CIA intelligence gathering on lawful domestic political activity by means of electronic eavesdropping, mail openings, undercover agents and FBI reports. The Senate staff report characterized Operation CHAOS as "a step toward the dangers of a domestic secret police." *See Final Report*, Book 2, 94th Cong., 2nd Sess., 1976, pp. 99-102.

While the FBI made some limited disclosures, 69 entire pages and portions of dozens of others were withheld based on the broad claim that disclosure of the records of a twenty-year old surveillance of a rock singer, dead now for over a decade, would somehow jeopardize our national security, invade privacy, or disclose confidential sources. In response to plaintiff's request for a *Vaughn* index,[3] the FBI filed generalized affidavits reciting vague boilerplate assertions which it apparently had copied verbatim from other, unrelated cases.

The affidavits failed to focus on *any* specific instance where an exemption has been invoked. Instead, the government used what it called a "coded" approach to *Vaughn* indices, in which one or more notations were recorded for each claimed exemption. Each notation referenced several possible explanations within the

---

[3]"Vaughn index" is a phrase derived from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). It is a system of itemizing and indexing correlating the government's justifications for refusing to disclose a document with the actual portions of the documents at issue.

submitted declarations for each of the various codes applied. The explanations, rather than being directed at the facts of this case, were broadly framed, exhaustive recitations of seemingly *all* imaginable adverse consequences that *might* result from unwanted disclosures. *See, e.g.*, Pet. App. at 5a-7a. Identical codes were invoked repeatedly -- some as often as fifty times.

In January 1984, Wiener objected that these affidavits did not describe the documents at issue, let alone explain why the material was being withheld, and thus were of no value in justifying the claimed exemptions. After the district court ordered the FBI to submit *in camera* more specific justifications, the FBI filed two *in camera* affidavits along with a copy of the withheld information. In August 1984, Wiener asked the court to order that those affidavits be disclosed, or that he be provided with more detailed affidavits than the ones he had received.

The district court never ruled on Wiener's motion for a more adequate *Vaughn* index. Instead, more than two years later, it invited the FBI to file a motion for summary judgment, which it granted in February 1988. In its ruling, the court adopted verbatim the proposed findings of fact and conclusions of law submitted by the FBI. Beyond listing the affidavits submitted by the government, the court merely stated that "[t]he above-listed affidavits and declarations carry the government's burden of proof to show that FOIA exemptions were properly applied in this case."

The court of appeals remanded on two grounds.[4] First, relying on *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), it held that the affidavits provided by the FBI failed adequately to explain the withholdings. As a result, Wiener could not "intelligently advocate release of the . . . documents," and the district court could not "intelligently judge the contest" (Pet. App. at 8a). The appellate court directed the government to submit more satisfactory affidavits, prior to which it could not rule on the merits of the FOIA suit.

Second, the court held that the trial judge had failed to state the reasons for his decision or to make specific findings as to whether any portion of a withheld document could have been segregated for disclosure. In the absence of such findings, the court of appeals held that it was unable to conduct a meaningful review.

Petitioners sought rehearing by the panel and suggested the need for rehearing *en banc*. The panel denied the petition, noting that the suggestion for *en banc* review had been rejected with no judge requesting a vote on the suggestion.

## REASONS FOR DENYING THE WRIT

The FBI petitions for certiorari to review an unexceptional opinion that simply applied settled procedural principles of FOIA litigation to the particular facts of this case. The court of appeals did not require petitioners to disclose any document, nor did it address

---

[4]The court of appeals found that it would be premature to address Wiener's contention that there were triable issues of fact regarding the FBI's claims of exemption (Pet. App. at 30a-31a).

the substantive requirements for invoking various FOIA exemptions. In fact, the court pointedly declined to rule on Wiener's claim that triable issues of fact remained and, therefore, that the district court had improvidently granted summary judgment. Rather, the court held that it was in no position to reach the merits of the dispute because the government had failed to provide the information necessary to enable respondent to argue, and the judiciary to decide, whether the materials at issue were properly withheld. The district court's *in camera* review could not remedy this situation, of course, for it left Wiener unable to support his claim and the courts incapable of conducting meaningful review. Petitioners' assertion that the court of appeals formulated new FOIA standards is thus erroneous or, at best, greatly premature. Indeed, far from expressing a judgment on the merits that the government had to divulge more than it already had, the court held that to rule on the basis of petitioners' submissions alone would subvert both the adversarial process and the proper operation of judicial review. The court of appeals' conclusion is unremarkable, limited in scope, and fully consistent both with the statutory goal and two decades of case law that has attempted to fulfill it. Accordingly, the decision does not warrant plenary review by this Court.

## I. The Decision Below Followed Settled Principles

1. Review should be denied because the Ninth Circuit did nothing more in this case than reiterate a well-established principle: That the government must provide both the judiciary and the requesting party in a FOIA suit with an explanation sufficient to "permit the court system effectively and efficiently to evaluate the

factual nature of disputed information.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 149 n.2 (1989) (quoting *Vaughn v. Rosen*, 484 F.2d at 826). The court of appeals did not require, and respondent did not ask for or expect, details that would be immaterial to this determination or that would reveal information properly exempt from disclosure. What petitioners ominously call "brinkmanship" (Pet. Br. at 2) is simply the commonplace obligation to provide information reasonably necessary to make a decision on whether to require disclose.

Petitioners' first question presented thus mischaracterizes the nature of the appellate court's holding. Of course, an agency need not provide additional information "if such detail is not needed to prove that the withheld material is exempt from disclosure under the [FOIA]." In this case, however, the court of appeals found precisely that such information *was* necessary in order for it, and the district court, to reach a just and informed decision. Surely, that finding, which is tied entirely to the facts of this case, provides no reason for review by this Court.

Morover, the conclusion is plainly correct. The aim of FOIA is to "create a judicially enforceable public right to secure [official] information from possibly unwilling official hands." *EPA v. Mink*, 410 US 73, 80 (1973).[5] For this right to be meaningful, especially

---

[5]Section 552(a)(4)(B) provides:

> On complaint, the district court has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case, the court shall

(continued...)

given the obvious imbalance between the two parties, Congress placed on the government agency the burden to establish that a given document is exempt from disclosure. 5 U.S.C. 552(a)(4)(B); *see also Mink, supra*. Courts traditionally have interpreted this to mean that the government must provide information sufficient to permit the requester to advocate effectively for release and to provide the court with an informed basis for its decision. Submission of a *Vaughn* index is one way, specifically approved by Congress, of achieving this goal. *See* S.Rep. No. 93-854, 93d Cong., 2d Sess. 14-15 (1974).[6]

It is an understatement to say that petitioners did not approach this case in that spirit. The affidavits that were given to the district court and to respondent were couched in terms so broad and conclusory that they were essentially useless, merely parroting the statutory grounds for withholding, without even remotely tying them to the

---

[5](...continued)

> determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section and the burden is on the agency to sustain its action.

[6]Beginning with the *Vaughn* decision itself, courts routinely have remanded for more detailed affidavits when the agency has not suitably supported its position. *See, e.g., Phillippi v. Central Intelligence Agency*, 546 F.2d 1009, 1015 (D.C.Cir. 1976); *Ferri v. Bell*, 645 F.2d 1213 (3rd Cir. 1981).

facts of this case.[7] Indeed, identical affidavits, "drawn from a 'master' response filed by the FBI for many FOIA requests" (Pet. App. at 6a), were also used in two wholly unrelated cases, *King v. United States Department of Justice*, 830 F.2d at 223 (Pet. App. at 6a n.7), and *Powell v. United States Department of Justice*, 584 F. Supp. 1508 (N.D. Cal. 1984).[8] In both instances, the courts found, as here, the formula affidavits "entirely inadequate." *See e.g.*, *Powell*, 584 F.Supp. at 1513.

The decision here does not, contrary to petitioners' suggestion (Pet. Br. at 12-14), require submission of a *Vaughn* index in *all* cases or establish a pre-defined standard of specificity with which all indices

---

[7]As the Ninth Circuit noted, John Lennon's name does not even appear in the original *Vaughn* index submitted by the FBI (Pet. App. at 6a).

[8]For example, the *King* opinion quotes part of the FBI's declaration offered in that case The declaration asserts that the requested information

> "may contain details obtained from a one-on-one conversation between a source and another individual. It may be of such detail that it pinpoints a critical time frame. . . . In sum it is the degree of specificity of this information that endangers the source's continued anonymity. It is my determination that disclosure of this information would enable a hostile analyst to unravel the cloak of secrecy that protects the intelligence source's identity."

830 F.2d at 223 n.96. The same exact language is mimicked in the affidavits submitted in this case, with the exception of the words "in sum" and "it is my determination that."

must comply. Nor does it in any way compel the government to reveal in an affidavit the very information for which a FOIA exemption is claimed. Rather, the appellate court made clear that it was concerned with whether the affidavits accomplished their dual purpose -- to "restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision" (Pet. App. at 4a) -- by approvingly citing to cases finding the government's affidavits adequate, even though they fell short of a *Vaughn* index, when they "described in sufficient detail the undisclosed material." *See* Pet. App. at 4a n.5 (citing *Lewis v. I.R.S.*, 823 F.2d 375, 378-79 (9th Cir. 1987); *Brown v. Federal Bureau of Investigation*, 658 F.2d 71, 74 (2nd Cir. 1981)).[9]

Based on the facts of this case, the court concluded that the particular *Vaughn* index submitted by the government was little more than a catalog of alternative grounds for exemptions that could just as easily have applied, verbatim, to the disclosure of documents concerning the spying of diplomatic personnel, nuclear proliferation, or ultra-sensitive military plans. The government offered the court, in the guise of a justification, an exhaustive inventory of all theoretically plausible statutory reasons for exempting a document from disclosure. In other words, this *Vaughn* index was no index at all, but rather an automatic, pre-

---

[9]Accordingly, there is no conflict between the decision below and the cases cited by petitioners (Pet. Br. at 13-14) for the proposition that *Vaughn* indices are not systematically required. All agree that the purpose of the index -- to "justify withholding requested information," *Vaughn v. United States*, 936 F.2d 862, 867 (6th Cir. 1991) -- must be met. The court of appeals found that in this case, it was not.

packaged reply, mechanically delivered in response to Professor Wiener's FOIA claims.[10]

For example, the justification for withholding the numerous documents relating to John Lennon to which the government affixed a "(b)(1)d1" code read as follows:

> The unauthorized disclosure of [this] information . . . can reasonably be expected to *inter alia*:
>
> Lead to foreign diplomatic, economic and military retaliation against the United States;
> Identify the target, scope, and time frame of intelligence gathering activities of the United States in or about a foreign country, resulting in the curtailment of these activities;
> Enable hostile entities to assess United States intelligence gathering activities in or about a foreign country and devise countermeasures against these activities;
> Compromise cooperative foreign sources, jeopardize their safety and curtail the flow of information from these sources;

---

[10]How else, for example, is one to explain the government's assertion that release of some information regarding the twenty-year old surveillance of a now-deceased rock star might "[l]ead to . . . military retaliation against the United States"? As the court of appeals remarked, "[n]o explanation is given why seemingly farfetched harms . . . have any relevance to the particular documents withheld" (Pet. App. at 14a).

> Endanger citizens of the United States who might be residing or traveling in the foreign country; resulting in damage to the national security.

Numerous other illustrations furnished by the Ninth Circuit speak for themselves and cast serious doubt on the government's boilerplate, kitchen-sink-inclusive approach to exemption justifications. *See* Pet. App. at 5a-8a.[11]

The court of appeals remained well within its traditional role, merely holding that the government's affidavits were inadequate for they allowed neither Wiener to challenge, nor the courts to judge (or even comprehend), the decision to withhold. It reasonably determined that sweeping and unsubstantiated assertions that disclosure of materials concerning former Beatle John Lennon's surveillance might cause "civil disorder or unrest in a foreign country," threats to our national security, and other, equally fantastic effects were too conclusory to justify withholding. This determination certainly is not cause to invoke the Court's power to grant review.

2. The only question, then, is whether under these precise circumstances resort to *in camera* review of the documents themselves, without the benefit of an adequate road map, constitutes a satisfactory procedural

---

[11]The Court of Appeals examined the adequacy of the *Vaughn* index in detail for each of the government's claimed exemptions, pointing out where and why it was at a loss to understand the link between the FBI's generalized assertions of potential injury and the content of the documents themselves.

protection.[12] Petitioners, noting that the court of appeals did not "hint[] that the district court erred on the merits," *id.*, claim that requiring additional indices constitutes "procedure for the sake of procedure." *Id.* The contention is without merit.

Indeed, cases from all circuits emphasize that *in camera* review, without more, exacerbates the very problems inherent in FOIA litigation. Certainly, it does not vindicate respondent's interest in being able intelligently to present his case before a court. *See* Pet. App. at 4a n.5. But it also fails just as assuredly to assist the court in reaching a decision whenever it is not self-evident, on the face of the document, *why* a claimed exemption should apply. So, the court found, it was here.

In fact, petitioners' suggestion would mean that, in reviewing a district court's decision, appellate courts themselves might be compelled to conduct their own *in camera* inspection, without the benefit of the government's -- let alone opposing counsel's -- guidance. This obligation to wade through a mass of documents represents a formidable burden on the court system, in effect a shift of the government's statutory burden to the judiciary. The court of appeals, in expressing this concern, simply echoed the views of sister courts. *See, e.g., Seafarers International Union of AFL-CIO v. Baldovin*, 508 F.2d 125 (5th Cir. 1979).

Ultimately, that the court of appeals required more detailed affidavits without ruling on the merits strengthens the case against this Court granting review: It indicates, once again, that the court's opinion was

---

[12]It is unclear from the record whether the district court relied on the *in camera* affidavits or not, and whether it examined the actual, unabridged documents that are at issue.

limited to the holding that it lacked sufficient information to reach a decision. Contrary to petitioners' assertion, it does not reflect pointless obsession with procedure. A court demanding a more adequate record before issuing its ruling is doing nothing more. In both instances, the court refrains from ruling on the merits because it is unable to, not because it wants the parties to overcome a superfluous procedural hurdle.[13]

Thus, petitioners are plainly wrong when they claim that "the Ninth Circuit did not express any doubt that the district had an adequate factual basis for its ruling" (Pet. Br. at 2, 21). At the very heart of the appellate court's decision is the fact that the agency failed to provide enough information "to afford the court an opportunity to intelligently judge the contest" (Pet. App. at 8a). *See also id.*, at 8a n.9.

3. Contrary to petitioners' contention (Pet. Br. at 12), there is no conflict between the decision in this case and the views of other circuit courts. Petitioners have cited to no case holding that *in camera*

---

[13]Indeed, there should be nothing surprising in a court's request for additional justification even *after* it has reviewed the documents themselves. Certainly, the government cannot be suggesting that a court, sitting without the benefit of *any* governmental input, could somehow sift through stacks of documents and determine which should, and which should not, be submitted to the public's scrutiny. *See Ingle v. Department of Justice*, 698 F.2d 259, 269-70 (6th Cir. 1983) (district court improperly decided that certain documents viewed *in camera* should be disclosed, without giving the government an opportunity to present any applicable exemptions). The Ninth Circuit's opinion expresses a similar sentiment: That neither it nor the district court could reach an informed decision absent appropriate explanations from the FBI.

review, as a matter of law, uniformly suffices for a court to reach a reasoned decision. In particular, the government errs in intimating disharmony with the D.C. Circuit (Pet. Br. at 14 n.10): Twice, that circuit has suggested that detailed public affidavits should be submitted *even* where *in camera* inspection has taken place, in order to appropriately focus and define the issues. *See Lykins v. Department of Justice*, 725 F.2d 1455, 1463 (1984); *Phillippi v. CIA*, 546 F.2d 1009, 1013 (1976).[14] Courts -- including in virtually all the cases cited by petitioners (Pet. Br. at 14 n.10) -- recurrently have underscored the shortcomings of *in camera* inspection. Indeed, these cases undermine rather than bolster the case for review by this Court, insofar as they emphasize that affidavits should be used unless they would reveal the very information which is claimed to be exempt.[15] Here, neither the district court, nor the court of appeals, nor, even, the governmental agency,

---

[14]Inexplicably, petitioners cite as providing support for their view a case that refers to both those opinions for that very proposition. *See King, supra*, 830 F.2d at 218 n.68, 225 n.119.

[15]*See Ingle, supra*, 698 F.2d at 266 ("The statute's legislative history and the Supreme Court's language in *Robbins Tire & Rubber Co.* [*see infra*], emphasize that no court should consider *in camera* review if a *Vaughn* index can adequately resolve the issue"); *King, supra*, 830 F.2d at 225; *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) ("The *in camera* review provision [of FOIA] is discretionary by its terms, and is designed to be invoked when the issue before the District Court could not be otherwise resolved").

maintained that a more helpful affidavit could not be produced.

Ultimately, the question whether a district court's exclusive reliance on *in camera* inspection despite inadequate agency justifications is permissible must turn on the particular facts of a case and therefore does not warrant review. An appellate court might uphold the trial judge's decision to proceed in such a manner.[16] But, contrary to petitioners' erroneous suggestion that no court ever has required the submission of additional *Vaughn* indices under such circumstances, it also might not. Directly on point is *Church of Scientology of California v. I.R.S.*, 792 F.2d 146 (D.D.C. 1986). In that case, plaintiffs had moved for an order requiring the government agency to prepare a *Vaughn* index of withheld documents. Denying this motion, the district court instead ordered *in camera* submission of some of the undisclosed materials, and, as in the present case, granted the agency's motion for summary judgment. The

---

[16]In only two cases cited by petitioners did the appellate court so hold. One, *Ingle*, *supra*, began by underscoring the "disabilities inherent in *in camera* review," 698 F.2d at 264, and the fact that it was "'contrary to the traditional judicial role of deciding issues in an adversarial context upon evidence openly produced in court.'" *Id.*, at 265 (quoting *Cox v. United States Dep't of Justice*, 576 F.2d 1302, 1311 (8th Cir. 1978)). Nonetheless, it concluded that, given the "relatively modest number of pages" to be inspected, *in camera* review provided the trial judge with an adequate basis for its decision. *Id.*, at 267-68. In the other, *Donovan v. F.B.I.*, 806 F.2d 55 (2nd Cir. 1986), the court noted that the trial judge had inspected the materials on two separate occasions, and therefore "[i]n this case, the District Court was thoroughly familiar with the litigation and the documents." *Id.*, at 59.

court of appeals vacated this order, faulting the trial court for ruling "without the benefit of detailed public affidavits or indices." *Id.*, at 153. As then Judge Scalia explained, such an approach might

> place [] unrealistic and unsustainable demands upon the trial court and the reviewing appellate panel, and therefore must be replaced or supplemented by the adversary testing which public affidavits and indices seek to provide.

*Id.*

Likewise, in *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C.Cir. 1986), the D.C. Circuit, like the court in this case, held that it could not affirm a decision to exempt certain documents from disclosure even though the district court had inspected them *in camera*. Because it lacked "a detailed record essential to this type of action," *id.*, at 1088, the appellate court remanded so that the government could justify its claimed exemptions with the necessary particularity. *Id.*, at 1092. In *Lame v. United States Dep't of Justice*, 654 F.2d 917 (3rd Cir. 1981), a case cited by the FBI, the court held that even documents submitted to the trial judge must be accompanied by detailed justifications for non-disclosure. *Id.*, at 922, 927-28. *See also Landano v. U.S. Dep't of Justice*, 956 F.2d 422, 436 (3rd Cir. 1992) ("While it is clearly appropriate for an agency to . . . tender its files, it cannot through such a tactic require the court to do its homework for it.").

Finally, petitioners' assertion that the holding in this case is incompatible with the recent decision in *Silets v. United States Dep't of Justice*, 945 F.2d 227 (7th Cir. 1991) (en banc), is groundless. The question in *Silets*

was whether the district court abused its discretion in denying an FOIA plaintiff's request for *in camera* review even though the government's affidavits were found to be sufficiently descriptive. But, as the court of appeals made clear in a separate order in this case, the present case has strictly nothing to do with the trial judge's discretion to order an *in camera* review -- whether or not the proposed affidavits or index are sufficient. *See* Pet. App. at 40a ("We expressed no views as to when, or whether, submission of [adequate] affidavits would make *in camera* review of the withheld documents unnecessary"). At issue was not the district court's decision to review the documents *in camera*; rather, it was the decision to reach a conclusion on that basis alone.[17]

## II. Review By This Court Would Be Premature

1. This case comes before the Court on the basis of a decision that holds only that petitioners' half-hearted effort to explain its withholdings was insufficient and that a more helpful affidavit was necessary. In

---

[17]On more than one occasion, petitioners read the court of appeals' opinion as holding that the trial judge erred in conducting *in camera* review, thereby "curtail[ing] the discretion of district courts" on such matters. *See, e.g.*, Pet. Br. at 11-12, 24. Of course, the opinion did nothing of the sort. It did not disturb, nor, indeed, even speak to, the scope of the district court's discretion to conduct *in camera* review -- for the simple reason that neither party challenged that decision. Cases such as *Vaughn v. United States*, 936 F.2d 862 (6th Cir. 1991), and *Lam Lek Chong v. United States Drug Enforcement Admin.*, 929 F.2d 729 (D.C. Cir. 1991), upon which petitioners rely (Pet. Br. at 13, 14 n.10), are thus inapposite.

short, the court merely required an affidavit conforming to Congress' mandate that the government carry its burden of establishing valid exemptions. Surely, petitioners cannot claim that *that* burden is excessive, especially since they have yet attempted to meet it. Were the court to reject a subsequent serious attempt to meet this criteria, there would then be ample time to consider petitioners' claim that the decision "places an intolerable burden on the government" (Pet. Br. at 21).[18] But at this point in the case, and on this

---

[18]There is no basis in the record for petitioners' estimates regarding the time it might take to prepare an adequate *Vaughn* index. *See* Pet. Br. at 21 n.17. Their inclusion in the petition for certiorari is thus as inappropriate as it is unwarranted. Moreover, the claim that the ruling below will inevitably result in an intolerable burden to governmental agencies is undercut by the fact that agencies, including but not limited to the FBI, routinely submit affidavits far more complete than the one at issue in this case.

Petitioners also make the claim that the decision will place a substantial burden on the courts. *Id.* As explained above, the contrary is true: By compelling appellate courts to undertake *in camera* review, even in the absence of adequate guidance from the agency, petitioners' procedure will unduly tax the court system.

record, the claim is speculative.[19] Review by this Court would thus be premature.

2. Petitioners also contend that the court of appeals "formulated onerous substantive FOIA requirements" regarding the scope of exemptions (Pet. Br. at 15). In fact, the court never engaged in the task of assessing whether a particular exemption applied, leaving that question to be addressed in the first instance by the district court on the basis of a more adequate record. The court specifically refused to rule on the district court's grant of summary judgment for the agency, holding instead that "[i]t would be premature to address Wiener's claim. Without an adequate *Vaughn* index and sufficient findings of fact to guide us we cannot say whether these documents, in light of the rest of the record, raise a triable issue of fact" (Pet. App. at 31a). As a result, the court of appeals' opinion will have

---

[19]Petitioners repeatedly make the claim that, in the course of discussing the adequacy of the FBI's *Vaughn* index, the court of appeals disclosed exempt information, thereby demonstrating the "unworkability" of the Ninth Circuit's "rule." *See* Pet. Br. at 12, 19-20. Wiener disputes the accuracy of petitioners' assertion regarding the alleged disclosures. However, even assuming that the FBI's characterization is correct, the conclusion it draws simply does not follow. To begin, even if the court erred while attempting to illustrate how the FBI could have complied with a well-settled standard in this particular case, that would not mean that the standard itself is faulty. More importantly, there is no reason for this issue ever to arise. For it is the agency's duty to furnish adequate explanations and the court's responsibility to appraise them; in that situation, the government can be trusted not to divulge information it believes should be withheld.

no impact on the interpretation and scope of FOIA exemptions.

The Court's decision in *Department of Justice v. Reporters Committee*, 489 U.S. 749 (1989), on which petitioners heavily rely, thus has no bearing on this case. There was no suggestion in *Reporters Committee* that the agency had inadequately explained its withholdings, no question as to the type of documents whose disclosure had been requested -- rap sheets -- and no uncertainty regarding the asserted interests on both sides. Therefore, the Court was able to engage in categorical decision-making, treating all rap sheets on private citizens alike. *Id.*, at 799-80. In contrast, the agency's affidavits in this case were insufficient to define what category petitioners claimed were exempt. Indeed, given the wide range of disparate documents to which they sought to apply Exemption 7(C), the only category broad enough to include them all appears to be one embracing *all* conceivable FBI documents, an outcome that would provide the agency a total exemption from FOIA. Nor did the affidavits suffice to show that the documents were compiled for legitimate law enforcement purposes. In sum, the issues in the present case were several steps removed from the far more focused one decided in *Reporters Committee*.

For the same reasons, the decision here does not conflict with any of the other cases cited by petitioners which deal with the substantive requirements under Exemptions 7(C) or 7(D). *See* Pet. Br. at 17-19. In all of them, the courts were able to decide the merits of a claimed exemption, either because the agency's affidavit was adequate, or because the overall record left no doubt as to factual issues that were critical for making such a determination. In other words, the substantive questions addressed in the cases relied on by petitioners

had reached the stage where they were fit for judicial resolution; here, they had not.[20]

Petitioners will be able to challenge rulings both on the adequacy of their subsequent affidavit, if their future submissions are rejected, or on the scope of FOIA exemptions, if they are dissatisfied with that decision. But it would be premature for this Court to grant review when no substantive decision has been reached, the record is incomplete, and the implications of the ruling below are speculative at best.

---

[20]In particular, petitioners' assertion notwithstanding (Pet. Br. at 18-19), there is no inconsistency between the opinion below and decisions that have held that information provided to a law enforcement agency is presumed to have been given in confidence. In fact, the court of appeals deliberately refrained from confronting the matter, stating simply that "regardless of what presumption may be appropriate," a court needs enough information to determine whether it might be rebutted (Pet. App. at 26a n.29).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: May 28, 1992

Respectfully submitted,

MARK D. ROSENBAUM
Counsel of Record
ROBERT MALLEY
PAUL L. HOFFMAN

DAN MARMALEFSKY
HUFSTEDLER, MILLER,
KAUS & BEARDSLEY

STEVEN SHAPIRO

Attorneys for Respondent